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IN THE

Supreme Court of the United States

_____ TERM, 1967

No. ~~1401~~ 170

JOE D. MORGAN and JACK THORNTON,
a partnership d/b/a M & T Gum
Machine Company, and JOE D. MORGAN
and JACK THORNTON, individually,

Appellants,

versus

STATE OF ALABAMA

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA
3 Div. 223

APPEAL FROM THE
SUPREME COURT OF ALABAMA

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STATEMENT AS TO JURISDICTION

The Appellants, pursuant to United States Supreme urt Rules 13(2) and 15, file this their statement of e basis upon which it is contended that the Supreme urt of the United States has jurisdiction on a direct

appeal to review the final decree in question and should exercise such jurisdiction in this case.

OPINION BELOW

The Supreme Court of Alabama delivered a written opinion in the above-styled cause by which it affirmed and adopted verbatim the final decree of the Circuit Court of Montgomery County, Alabama, in said cause. That opinion, entered on January 26, 1966, has not yet been reported in any official court reporting system but is recorded in the records of the Supreme Court of Alabama, October Term, 1966-67, 3 Div. 223. The Supreme Court of Alabama denied rehearing without opinion on February 16, 1967. Since the opinion of the Supreme Court of Alabama incorporates fully the final decree of the Circuit Court of Montgomery County, Alabama, the decree is appended as a part of the opinion of the Supreme Court of Alabama and is not repeated as a separate opinion (Appendix A).

JURISDICTION

The appeal herein is from an opinion of the Supreme Court of Alabama, affirming a final decree of the Circuit Court of Montgomery County. A state statute, Code of Alabama 1940, Title 61, Section 613, initially levied a license on the operator of a coin-operated machine and provided that, if an unlicensed machine were discovered in a place of business, the operator of the place of business "shall be conclusively presumed to be the operator of the machine and shall be liable for the license". The state courts held that "to construe the word 'shall' as used in said proviso in the sense of being imperative or mandatory, and the presumption to be a con-

clusive and irrefutable one would cause the proviso to be unconstutional, as being in conflict with the due process clause of the Federal Constitution and comparable provisions of the State Constitution" and would "deprive the operator of the place of business, where the machine is located, of his day in court." To avoid this supposed repugnance to the due process clause of the Fifth Amendment to the Constitution of the United States, those courts construed the question to mean that the operator of the business may or may not be presumed to be the operator of the machine and that Appellants were liable for the tax. The Supreme Court of Alabama entered its opinion on January 26, 1967.

A motion for rehearing was filed in the Supreme Court of Alabama and was overruled on February 16, 1967. Notice of appeal was filed in the Supreme Court of Alabama on March 31, 1967.

The Supreme Court of the United States has jurisdiction to review the opinion of the Supreme Court of Alabama by the provisions of 28 U.S.C., Sections 1257 (2) and 2101(c).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

> *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 68 L.Ed. 582, 44 S.Ct. 274, reversing 233 N.Y. 373; *Williams v. Bruffy*, 102 U.S. 248, 26 L.Ed. 135; *Whitfield v. Ohio*, 297, U.S. 431, 80 L.Ed. 778, 56 S.C. 532.

The statute of the State of Alabama that is involved is the licensing statute for coin-operated machines, Code

of Alabama, Title 51, Section 613, which, after providing for certain licenses, reads in pertinent part as follows:

> "The licenses herein provided for shall be levied upon the operator of the machine * * *; provided, however, that in the event any unlicensed machine, * * * is found in any establishment or place of business, the operator of such establishment or place of business shall be conclusively presumed to be the operator of such machine, * * * and shall be liable for the license therefor."

The courts below held that the words, "*shall* be *conclusively* presumed", should be construed to read "*may* be *rebuttably* presumed" and that any other construction would deprive the operator of the place of business of his day in court.

STATUTES AND CONSTITUTIONAL POWERS

The pertinent part of the state statute, Code of Alabama, Title 51, Section 613, the constitutionality of which was questioned in the case below, at pertinent times was as follows:

> "The licenses herein provided for shall be levied upon the operator of the machine * * *; provided, however, that in the event any unlicensed machine * * * is found in any establishment or place of business, the operator of such establishment or place of business shall be conclusively presumed to be the operator of such machine * * * and shall be liable for the license therefor."

Section 613 in its entirety is appended hereto as Appendix B.

As an indication of the intent of the Alabama Legislature as to how this statute should be construed, we submit a copy of the same provision of the same statute as now amended (not otherwise pertinent to this decision) as follows:

> "The licenses herein provided for shall be levied upon the operator of the machine * * *; provided, however, that in the event any unlicensed machine * * * is found in any establishment or place of business, the operator of such establishment or place of business shall be the operator of such machine * * * and shall be liable for the license therefor."

We suggest that this amendment clearly shows that the Alabama Legislature intended to place on the operator of the place of business wherein an unlicensed machine is found the responsibility for payment of the license tax.

The doing of a business for which a license is required without having obtained that license is made a crime by Code of Alabama, Title 51, Section 834, as follows:

> "§834. *Penalty for failure to take out a license.* —(a) It shall be unlawful for any person, firm, or corporation to engage in or carry on any business, or do any act for which a license is required now or may hereafter be by law, without having first paid for and taken out a license therefor in the manner in this title provided. Any person who is convicted of failing to take out and pay for the license required shall be fined not less than the amounts of all licenses required of him, and if convicted for refusing to

take out the license shall on conviction, be fined not less than the amount of the state and county license due by him and not more than one hundred dollars in addition thereto, and may be sentenced to hard labor for the county for not more than six months; all fines to be paid in money, and when collected, two-thirds shall be paid to the state and one-third to the county. (b) No person shall be allowed the privilege of selling throughout the state under one license except by special provisions of law."

Appellants include this statute because, under the state courts' construction of Section 613, a retroactive effect is afforded this criminal statute so that, insofar as the operator of a business is concerned, the criminal law is ex-post facto. The Constitution of the United States, Article I, Section 10, in pertinent part, is as follows:

"(Restriction Upon Power of States) No state shall * * * pass any * * * ex post facto law * * *."

We suggest that several provisions of the Federal Constitution have been violated by the interpretation placed on Section 613 by the Supreme Court of the State of Alabama. The pertinent part of the Fourteenth Amendment with which we are concerned is as follows:

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of * * * property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

The vesting of arbitrary power in a state official violates this clause of the Constitution.

Appellants also insist that the action of the Court in granting legislative powers to an official and in exercising legislative powers by the Court constitutes a violation of Article IV, Section 4, Constitution of the United States, in that said section guarantees a republican form of government. Said Section 4 reads as follows:

> "The United States shall guarantee to every state in this Union a republican form of government * * *"

Appellants insist that a republican form of government contemplates a government by representatives selected by the people with certain authority granted by the people; that this authority stems from the State Constitution and the division of powers set up by Section 43 of the Constitution of the State of Alabama; and that Article IV, Section 4 of the Constitution of the United States, provides that the United States shall guarantee to every state that this form of government shall stay in existence and that no branch, whether it be legislative, judicial or executive, may usurp the powers of any other Branch. Section 43 of the Constitution of the State of Alabama is, in pertinent part, as follows:

> "Sec. 43. In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end

that it may be a government of laws and not of men."

QUESTIONS PRESENTED

Section 613, as construed by the state courts, permits someone, without a hearing or rules to guide him, to determine whether or not the operator of a place of business wherein an unlicensed machine is located may be presumed to be the operator of the machine and, therefore, whether or not such person may be presumed, retroactively, to have violated the crime of not having theretofore obtained the license. Under this construction of the statute, the Revenue Department may collect the licenses in question from the operator of the machine or the operator of the business—whomever it may more easily catch.

Principal questions presented are the following:

1. Whether the State of Alabama has the capacity to question the constitutionality of the license statute by virtue of which it sought a collection.

2. Whether the provision of the statute in question was unconstitutional because it provided for a "conclusive presumption".

3. Whether that portion of Code of Alabama, Title 51, Section 613, as quoted hereinabove, and as construed by the Supreme Court of Alabama is unconstitutional as prescribing arbitrary discretion in an official, without a hearing, to determine which of two persons is civilly and criminally liable to pay a license tax without prescribing specific rules guiding the exercise of this discretion.

4. Whether the above provision is unconstitutional as providing to a member of the executive branch of the government a legislative power of deciding which of two persons shall be liable for the payment of a license on an unlicensed machine.

5. Whether or not the above provision of the statute, as construed by the state courts, effects an ex post facto law when construed with the criminal provision thereunto pertaining.

6. Whether the trial court's actions and those of the Supreme Court of Alabama, in changing the plain, unambiguous meaning of the statute, was unconstitutional as invading the province of the Legislature.

7. Whether, if some part of the statute is constitutionally objectionable, only the objectionable portion thereof should be stricken.

STATEMENT OF THE CASE

The Appellants own and service penny gumball dispensing machines within the State of Alabama. They do business by contract in substantially the following manner. The Ford Gum and Machine Company manufactures gumballs and machines for vending the same. The machine and the gumballs are sold to persons (characterized as "operators") such as the Appellants herein, who in turn make arrangements with local civic clubs (characterized as "sponsors") whereby the civic clubs procure locations for the machines and generally promote gum sales in the club's name. In return, each civic club receives twenty per cent of the gross receipts of each vending machine it sponsors and agrees to pay any taxes levied on the machine.

On November 9, 1961, the Department of Revenue of the State of Alabama assessed a license against the Appellants herein. On that same date, other assessments were made by the said Department of Revenue covering different periods of time, different operations of the Appellants, and operations of others than the Appellants. The Appellants and the others similarly situated appealed to the Circuit Court of Montgomery County, In Equity, under Code of Alabama, Title 51, Section 140, as recompiled in 1958, by petitioning the said Court to quash, set aside, or reverse the said assessments. The State joined issue by answers. For the purpose of taking the appeal, the assessments against Appellants were consolidated and treated as one appeal by the lower court by agreement of the Court and of the parties, as the facts were very similar and the legal questions involved were identical. By agreement the other cases were held in abeyance and continued in the Circuit Court of Montgomery County, Alabama, pending the final adjudication of this cause. These facts are related herein to explain the references appearing in the record thereunto pertaining.

The licenses in question, were levied under Code of Alabama, Title 51, Section 613, on unlicensed machines found in various business establishments. The state statute, the validity of which was drawn in question on the grounds of its being repugnant to the Constitution of the United States was the licensing statute, Code of Alabama, Title 51, Section 613, as follows:

> "The licenses herein provided for shall be levied upon the operator of the machine * * * provided, however, that in the event any unlicensed machine * * * is found in any establishment or

> place of business, the operator of such establishment or place of business *shall be conclusively presumed to be the operator of such machine* * * * and shall be liable for the license therefore." (Emphasis ours)

The parties stipulated all facts in writing and the cause was submitted on the petition, the answer and the stipulation without the taking of testimony. The State contended that the words "shall be conclusively presumed" in the statute would, if construed as written, deprive the operators of the places of business where such machines were located of their day in court and would violate the due process clause of the Federal Constitution. The State insisted that this phrase should be construed as follows, "may be rebuttably presumed * * *". Appellants contended that the Department of Revenue lacked capacity to attack the statute, that the statute was not ambigous and, therefore, was not subject to construction, and that the statute was valid as phrased and clearly placed a license tax for unlicensed machines on persons other than the Appellants. Appellants further contended that, if the supposed objectionable clause, "shall be conclusively presumed to be the operators of the machine", were stricken, the statute would place on the operator of a business the burden of seeing that all such machines displayed on his premises are licensed.

The Circuit Court of Montgomery County, Alabama, found the following:

> "For the conclusion contained in the proviso to be so construed as a conclusive and irrefutable one *than* (then) would in the opinion of the Court effectively deprive the operator of the place of business, where the machine is located,

of his day in court, and would be in the Court's opinion in conflict with the due process clause of the Federal Constitution * * *." (Appendix A, page 10). (Italized expression ours)

The Court further made the following finding:

"2. The Legislature, in enacting the proviso in Section 613, which is under consideration in this case, and in providing that the 'establishment shall be conclusively presumed to be the operator of the machine', where an unlicensed vending machine is found in the establishment, appears under the circumstances to have clearly used the word 'shall' as being merely permissive and as the equivalent of 'may', and thus intended the conclusion to be a rebuttable one where there was evidence to the contrary." (Appendix A, pp 12, 13)

From the final decree of the said Circuit Court, appeal was perfected to the Supreme Court of Alabama. The Supreme Court of Alabama in its opinion in the cause fully set out the opinion of the Circuit Court of Montgomery County, Alabama, and adopted the same as the opinion of the Supreme Court of Alabama. In the interest of brevity, the final decree of the Circuit Court of Montgomery is appended as a part of the opinion of the Supreme Court of Alabama.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Supreme Court of Alabama has held that that part of the Licensing Statute, Code of Alabama, Title 51, Section 316, which holds that an operator of a business establishment in which is found an unlicensed machine "shall be conclusively presumed to be the operator

of the machine" is constitutional and not within the prohibitions of the due process clause, if it is construed by the Court to mean that the operator of such a business may or may not be presumed to be the operator of the unlicensed machine and, therefore, liable for the tax. The Supreme Court of Alabama has held that the statute should be so construed to avoid the constitutional prohibition against depriving the operator of the business establishment of his day in court and depriving him of his property without due process of law.

The Legislature of the State of Alabama, subsequent to the levy of the taxes involved in this case but prior to the decision of the Supreme Court of Alabama, has amended the proviso and the statute to read as follows:

> "* * * provided, however, that in the event any unlicensed machine, * * * is found in any establishment or place of business, the operator of such establishment or place of business shall be the operator of such machine, * * * and shall be liable for the license therefor."

The legislative intent, as declared by the amendment to the proviso in the statute, is clearly that the operator of a place of business wherein unlicensed machines are displayed is responsible for seeing that the machine is licensed or is responsible himself for the license.

The State Supreme Court has found it necessary to construe a statute which could have not more clearly, except by use of the words of the statute as amended, have expressed the legislative intent that the operator of the place of business wherein the machines were located, should be liable for the license therefor if the machines were not otherwise licensed. The statute was not am-

biguous and, therefore, was not subject to judicial construction.

Several matters presented to the Courts below and, apparently, disregarded by them should be considered prior to considering the confusing results of the State Courts' construction of the statute in question because each of these matters separately militates against the validity of the State Courts' opinions.

THE STATE MAY NOT ATTACK ITS OWN STATUTE

This Court would first consider the procedural question whether or not the State may question the constitutionality and/or validity of its own taxing statute in a proceeding wherein it seeks to enforce the statute. This point was not ruled on explicitly by the trial judge; however, it was presented and argued at great length below and the Trial Court, in ruling in favor of the State, conclusively showed that the question was resolved adversely to the present Appellants. Many cases indicate that the State lacks such authority. It cannot take inherently inconsistent positions and say that it can collect taxes under this statute, but at the same time question the statute's constitutionality.

In 16 Am. Jur.2d, Constitutional Law, Section 135, under the title of "Proceeding or Accepting Benefits under Legislation", we find the following:

> "The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Certainly such a person will not be allowed to retain his advantage or keep his con-

> sideration and then repudiate the act as unconstitutional. This principle applies also to questioning the rules or actions of state commissions.
>
> "From the foregoing discussion, the rule naturally develops that one who invokes the provisions of a law, in proceedings or otherwise, may be denied the right to question its constitutionality. Thus, one who brings a suit under a statute thereby concedes its validity."

Cases to this effect are too numerous to require lengthy citation, but as supportive authority, see *Eliason v. Wilborn*, 281 U.S. 462, 50 S.Ct. 387, 74 L.Ed. 962 (opinion by Mr. Justice Holmes); *St. Louis Malleable Casting Company v. Pendergast Construction Company*, 260 U.S. 469, 43 S.Ct. 178, 67 L.Ed. 351; and *Pierce Oil Corporation v. Phoenix Refining Company*, 259 U.S. 125, 47 S.Ct. 440, 66 L.Ed. 855. The case of *St. Louis Malleable Casting Company v. Pendergast Construction Company*, supra, was an attempt to attack the constitutionality of a sewer assessment. The single headnote to the case aptly summarizes it:

> "A property owner who connects his property with a sewer is estopped to contest the validity of the proceedings by which the sewer district was established and the validity of the tax imposed * * *."

This, of course, was based on the well settled rule of law that one who avails himself of the benefits of a statute cannot attack it.

The Alabama cases on this point are numerous and are clearly in accord with the general law on the sub-

ject and with the decisions of the United States Supreme Court as set out above. See, for example, *Reed v. State*, 234 Ala. 306, 174 So. 498, a case in which the election officials of a particular district denied its existence. The Supreme Court of Alabama made short work of this contention with the following statement:

> "Moreover, the appellants, who acted as officials of the election in said precinct 27, are in no position to dispute the existence of such precinct in this case."

Of similar import are the cases of *Dillon v. Hamilton*, 230 Ala. 310, 160 So. 708, and *Larry v. Taylor*, 227 Ala. 90, 149 So. 104. The former involved a tax assessor who attempted to collect commissions under a statute but at the same time asserted, for other purposes, that the statute was void. The Court held that one claiming and asserting rights under a statute cannot assert its unconstitutionality.

A closely related but separate prohibition against the State's attacking the statute is the rule that public officers cannot raise questions of this nature. Much, if not all, of the above discussion pertaining to the State's right to attack the statute passed in its behalf is applicable here; for the sake of brevity, we will not repeat it but incorporate it herein by reference.

At 16 Am.Jur.2d, Constitutional Law, Section 128, we find the following:

> "Under the general principle that the constitutionality of a statute cannot be questioned by one whose rights are not affected thereby and who

> has no interest in defeating it, the question has arisen as to whether a public officer has such interest as would entitle him to question the constitutionality of a statute and to refuse to comply with its provisions. It has generally been answered in the negative. Thus, it has been held that a ministerial officer cannot question the constitutionality of a statute fixing his ministerial duties, since the interest of such officer is official, not personal; and if the rule were otherwise, petty ministerial officers of the state could ignore any law which they deemed to be invalid. * * *"

One of the cases cited, a case holding that a tax assessor may not question constitutionality of a tax statute, is quoted in most impressive language:

> "To allow a ministerial officer to decide upon the validity of a law would be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all other like officers may do the same and thus an end be put to civil government, one of the cardinal principles of which is subjection to the laws. *People ex rel State Board of Equilization v. Pitcher*, 61 Colo. 149, 156 p 812."

The Reed and Dillon cases, supra, of Alabama are in accord. In the case at bar the "ministerial officers" simply decided that the statute in question was unconstitutional and that they should not and would not be bound by it in its entirety. To allow such action would, as suggested by the Pitcher case, result in anarchy and chaos.

It is also a well recognized rule of law that "A person who in any way procures the passage of an act is

generally considered as estopped and as not being entitled to question its validity," 16 Am.Jur.2d, Constitutional Law, Section 134. While there is no formal proof in this case that the State Department of Revenue was instrumental in procuring this legislation, it is common knowledge and a fact of which this Court can take judicial notice that the Revenue Department has revenue measures passed to suit its needs. We submit, therefore, that for each and all of the above reasons, the Revenue Department is in no position to attack this statute.

THE STATUTE IS CONSTITUTIONAL

The next matter deals with the holding of the state courts that:

> "For the consideration contained in the proviso to be so construed as a conclusive and irrefutable one *then* would in the opinion of the Court effectively deprive the operator of the place of business, where the machine is located, of his day in Court and would be in the Court's opinion in conflict with the Due Process Clause of the Federal Constitution and comparable provisions of the State Constitution and cause the proviso to be unconstitutional."

Here, we think, the State Courts were basically in error. We know of no constitutional prohibition against the Legislature's levying a license against the owner of a business in which a vending machine is habitually operated.

The rule of law respecting conclusive presumptions is simple. An exhaustive annotation of the subject may be found in 162 A.L.R., beginning with page 495. Stated

in its simplest form, the rule is this: If the Legislature attempts to declare one fact conclusive evidence of another and thereby accomplish an end by creating a rule of evidence which could not have constitutionally been accomplished by a substantive law, the statute is violative of the Constitution. If, however, the Legislature simply uses the term "conclusive presumption" or similar language to create substantive law which could constitutionally have been created in a different or more direct manner, the statute is clearly constitutional. For example, let us suppose that the Legislature should pass a law stating that any person picked up by the police and refusing to answer their questions should be conclusively presumed to have waived his right to counsel. Clearly, such a law could not stand; it would be an attempt to do by rule of evidence what could not be done by rule of law, i.e., deprive an accused of right to counsel.

On the other hand, let us suppose the Legislature passes an act to the effect that any person found driving an automobile which does not bear proper license plates is conclusively presumed to be the owner of that vehicle for the purpose of paying a fine levied against persons owning unlicensed vehicles. The law would stand. There is no reason why the Legislature could not make the driving of an unlicensed vehicle a crime just as it could make the ownership of an unlicensed vehicle a crime. It would simply be using a round-about way of saying, "It is against the law to drive an unlicensed vehicle". The latter violates no constitutional provision, and the fact that the term "Conclusive presumption" was used does not make the law invalid.

The instant case is highly analogous to the hypo-

thetical example above. The Legislature provided that if an unlicensed gum machine were found in a business establishment the owner of that establishment should be conclusively presumed to be the owner of the machine for the purpose of paying tax on it. This is simply another way of saying that owners of business establishments in which unlicensed gum dispensers are located must pay a tax on them. We can see no constitutional provision against the Legislature's passing such a law if it so desires, and it obviously did exactly this. The annotation in 162 A.L.R., supra, contains the following pertinent language at page 517:

> "It is to be noted, however, that many statutes which in terms declare certain facts to be conclusive evidence are regarded as declaring rules of substantive law, dispensing with a certain element or elements in the chain of proof necessary to establish the case. Such statutes are not held to be unconstitutional * * *.
>
> "Similarly, the provision of a state negotiable instrument law where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed was held in *New Port v. Fidelity and D Co.*, (CCA 5) 105 F2d 348, 123 A.L.R. 1352, not to take property without due process of law nor to invade the province of the judiciary and, hence, to be constitutional. The court said: 'We recognize that the Legislature cannot make certain facts conclusive proof of another ultimate fact when there is no logical connection or probability in experience to connect them. But the real legislative intent may not be to make a rule of evidence, but a rule of substantive law, and if the Legislature may constitutionally do the lat-

> ter, the form of words used will not defeat the intent. Statutes often say that certain acts 'shall be deemed', or 'shall be held to be', or 'shall be conclusively presumed to be' something else which is enjoined or forbidden, when the real purpose and effect is to enjoin or forbid those acts, and not to stultify the courts into really deeming or presuming one thing to be another. * * * It is not capricious or arbitrary, but a reasonable fixing of the rights of the parties. Notwithstanding the form of the words used, it is not a stultification of the courts, but a direction to them * * *'."

Clearly, in the case at bar the legislative intent was where the machine is unlicensed to place the burden of seeing that the machine is licensed on the person most likely to be available to the license inspector, that is, the person operating the place of business within which the vending machine is located; and, clearly, the Legislature places the responsibility for the license, without ambiguity, on some person other than the Appellants in this cause.

ARBITRARY DISCRETION OF OFFICIAL

A most shocking result of the decision is that it places within the discretion of an official, presumably a license inspector or the taxing authority of the State of Alabama, a discretion of determining retroactively whether the responsibility, both civil and criminal, for obtaining a license for an unlicensed machine is borne by the operator of the machine or by the operator of the business within which the machine is found without prescribing specific rules to guide the exercise of this discretion.

Courts throughout this nation, including this Court and the Supreme Court of Alabama, have consistently held that the vesting of such a discretion in an official without providing for rules to guide the exercise of the discretion is a violation of the "equal protection" clause of the Federal Constitution and of similar clauses of the State Constitutions.

> "A statute which vests arbitrary discretion with respect to an ordinarily lawful business * * * in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals, etc., according as the designated official arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform, is unconstitutional and void as being in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. *Yick Wo v. Hopkins*, 118 US 356, 30 L.Ed. 220, 6 S.Ct. 1064; *Barthet v. New Orleans*, 24 Fed. 563; *Montgomery v. West*, 149 Ala. 311, 42 So. 1000; and cases cited." 12 A.L.R. 1436.

The Supreme Court in *Yick Wo v. Hopkins*, supra, recognized that the placing of a discretion in a public official without rules to govern the exercise of that discretion violates the Constitution and that the individual must be protected against this evil and stated:

> "* * * so that, in the famous language of the Massachusetts Bill of Rights, the government of the common wealth may be a government of

laws, and not of men. For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoying of life, at the mere will of another, seems intolerable in any country where freedom prevails, as being the essence of slavery itself."

The Supreme Court of Alabama, as early as 1907, in *Montgomery v. West*, supra, recognized the same rule and held unconstitutional an ordinance forbidding the operation of steam engines, etc., within the City of Montgomery, without first obtaining the consent of the council, because that ordinance did not prescribe a general uniform rule, condition, or regulation to which all citizens similarly situated might conform, but reserved to the City Council the right to grant or withhold the privilege as suited its pleasure by the exercise of an arbitrary discretion. In *State ex rel Makris v. Superior Court* (Washington), 193 Pac. 845, 12 A.L.R. 1428, 1431, the Supreme Court of Washington, after having cited numerous decisions, including *Yick Wo v. Hopkins*, supra, states the following:

"All of those decisions were rested upon the principal that an ordinance which authorizes the issuing or withholding of a license to engage in a lawful business, that is, a business which within itself is ordinarily perfectly lawful, and committing to any officer or set of officers the power to decide according to their own notions, in each particular case, the questions of the propriety of issuing or withholding a license therefor, and thus deciding who may or who may not engage in such business, is authorizing the exercise of arbitrary power in violation of the guaranty of the Fourteenth Amendment to the Constitution of the United States

that 'no state shall * * * deny to any person within its jurisdiction the equal protection of the laws'."

In the instant case, the Supreme Court of Alabama as changed the word "shall" to "may" and, thereby, ven a discretion to a licensing official to determine hether an operator of a machine or an operator of a ace of business within which said machine is found all be liable for the license therefor. Such a construc- on grants a bare and arbitrary discretion without any iles for exercising the same and would be in violation the "equal protection" clause of the United States onstitiution.

ENCROACHMENT BY EXECUTIVE ON LEGISLATIVE POWERS

The interpretation of the statute by the State Courts as effected an encroachment on a division of powers as t up by Section 43, of the Constitution of the State of labama. That section reads as follows:

> "Sec. 43. In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

he interpretation placed on Section 613 by the State urts provides that an official of the state, presuma-

y the license inspector, shall determine, without the d of any rules whatsoever, whether the operator of the ace of business within which the machine is located all be presumed to be the operator of the machine d, therefore, liable for the tax and penalty? The State urts, by construing the statute as vesting in a public ficial the right to determine liability for the tax, have anted legislative power to an executive in violation of id Section 43 of the Constitution of Alabama, have, to e extent of the enforcement of the statute, provided a vernment of men rather than of laws, and have de-ived Appellants of their property without due process law.

The State Courts' construction of the proviso would prive the operator of the place of business within ich the unlicensed machine is located of his money thout due process of law should the official decide at the license tax should be paid by that person. If may be presumed to be the operator of the machine d, therefore, liable for the taxes, he is in no position question, first, who has the authority to so pre me n to be liable for the taxes, and, secondly, under what of rules may that individual determine that he is ble for the payment of the taxes. Presumably, some rson, possibly the license inspector, may, arbitrarily d without rhyme nor reason, presume him to be the erator of the machine and, therefore, liable for the x. In our view, nothing could be more remote from e American system of government.

EX POST FACTO LAW

We suggest that the construction adopted by the State urts in this cause creates a strange and undesirable

situation in that it provides that the operator of the place of business within which an unlicensed machine is found "may" or may not be the person on whom the license is levied. It follows that he may or may not be criminally liable for failure to have previously obtained the license. He is in the unenviable position of having to wait until after a license inspector or someone else decides that he is liable for the license before he may know whether or not he had violated a criminal law. Surely, this cannot have been the intention of the State Courts.

One cannot be guilty of a crime of evading a tax until he becomes liable for the tax. Yet, under the State Courts' interpretation of the statute, the operator of the place of business "may" be presumed to be the operator of the machine and, therefore, immediately liable for the tax civilly and criminally. The statute does not inform us who decides that the operator of the business is presumed to be the operator of the machine or by what rules he makes this decision. In the normal order of things, the license having become overdue, a license inspector would commence an attempt to collect it. Under the interpretation of the State Courts, the license inspector, presumably, would then determine whether the operator of the place of business was or was not liable for the tax. If the license inspector presumes that the operator of the business is the operator of the machine, by whatever rules or reasoning, then the operator of the business is immediately civilly liable for the tax and criminally liable for having failed to pay it, though he had not been theretofore responsible to pay it. The act of the criminal attains its illegality subsequent to its commission, when the license inspector decides that he was responsible for the license tax.

We concede that the usual conception of an ex post

facto law involves the passage of a criminal law which provides that a theretofore innocently committed act is a crime. However, this Court has long recognized that the term "ex post facto law" might have a somewhat different meaning.

> "An ex post facto law is one which renders an act punishable, in a manner in which it was not punishable when committed", *Fletcher v. Peck*, 6 Cranch, 87, 138; *Black's Law Dictionary*.

At the time the operator of the business fails to pay the license tax, this is an innocent failure. If a law provided that, because of the exercise of discretion by an official, it is subsequently determined that the businessman is the operator of the machine and his theretofore innocent act becomes a crime, that law is an ex post facto law barred by the Constitution, Section 10.

The questioned opinion is to the effect that, to give effect to the plain and unambiguous language of the statute, would in some way be unconstitutional and that, therefore, the Revenue Department should be vested with the authority to change the word "conclusively" to "prima facie" and use the word "may" interchangeably with "shall". Appellants offer the Court a much more reasonable solution. Simply give the Legislature credit for meaning what it very explicity said, place the burden of seeing that a vending machine is licensed on the operator of the business where the machine is displayed. The obvious purpose of the language in question is to create a rule of substantive law, and it, therefore, offends the Constitution in no way.

The State relies heavily on the case of *State v. Wood*,

242 Ala. 184, 5 So.2d 732, which it quotes to substantiate its contention that the areas occupied by gum machines within the stores in question were places of business in and of themselves, entirely separate and apart from the stores, and that, therefore, the Appellants were really the "operators of such establishment or place of business" mentioned in the proviso. This is fallacious for two reasons. First, the Wood opinion was not well reasoned. The dissenting opinion of Chief Justice Gardner should have been followed. We say this primarily for the reason that the majority's construction rendered the proviso completely useless and redundant. It merely holds that the Legislature placed the tax on the owners of the machines, and if unlicensed machines were found in stores, it again placed the tax on the owners of the machines. Had this been the Legislature's intent, they would hardly have inserted the proviso in the first place.

The second reason why Wood does not control the instant case is that the statute has been changed since that decision was rendered. The statute at that time read (and we quote from the case):

> "* * * Provided further that for the purchase of any excise or consumption taxes the payment of which is not evidenced by stamps, levied on any of the articles dispensed through such machine, the person in whose place of business such machine is located shall be considered the consumer of such articles and shall be liable for such taxes measured by the regular retain price thereof. (Ib.; 1936-37, Ex Sess., p 32; 1939, p. 519)"

Pretermitting any discussion of whether or not "the *person* in whose place of business such machine is found"

is the equivalent of the "*operator* of such establishment or place of business", it is certain that "considered" is not the equivalent of "conclusively presumed". The obvious explanation for the change is that the Legislature was not pleased with the Wood decision and changed the law to circumvent it. That is legislative prerogative. Now the Revenue Department is not pleased with the law and wants to change it. That is *not* executive (or even judicial) prerogative.

ENCROACHMENT BY STATE COURTS ON LEGISLATIVE POWERS

The actions of the Trial Court and of the Supreme Court of Alabama, in renovating and changing the meaning of a plain, unambiguous statute, invaded the province of the Legislature of the State of Alabama and constituted a deprival of Appellants' money without due process of law. It is hornbook law that the rules for the interpretation of statutes are useful only in cases of doubt, *Kreutner v. State*, 202 Ala. 287, 80 So. 125, and that the words of a statute should be given their plain, natural, common and ordinary meaning. *Hill Grocery Co. v. State*, 26 Ala. App. 302, 159 So. 269. Surely nothing could be more clear and unambiguous than the phrase with which we are here concerned. To construe "conclusive" to mean "prima facie" or "shall" to mean "may" does injustice to both the Alabama Legislature and the English language. Each of these words has a common, ordinary, and well understood meaning. *Webster's New Collegiate Dictionary* defines the word "conclude", from which "conclusively" is derived, as "putting an end to debate or question; decisive; final". We have no doubt that every member of the

Legislature would so define it; this is its common, customary, and everyday meaning. On the other hand, Webster defines "prima facie" as "literally, on first appearance", and "prima facie evidence" as "evidence sufficient to raise a presumption of fact or establish the fact in question unless rebutted". The courts are not at liberty to disregard or change the clear and unambiguous wording of the statute to suit the whims and convenience of an administrative department.

The word "shall" is mandatory; "may" is permissive. *Jenney v. Assessors of Mattapoisett*, 322 Mass. 76, 76 N.E.2d 126. On some occasions, courts have found it necessary to substitute one of these for the other, as was pointed out by the learned Trial Judge in his decree. None of the cases cited therein impress us as being persuasive of this case; neither do we find any cases directly in point. Therefore, let us consider the result of such a substitution. To judicially amend the statute to read that "the operator of such establishment or place of business *may* be conclusively presumed to be the operator of such machine" would work a manifest injustice. It would invest a state executive department with sole discretion to determine who should bear this tax. No operator of a business or of a machine could know in advance whether or not he might be called upon to pay it; rather a state ministerial official could arbitrarily and capriciously decide who should be liable. If there is any unconstitutionality involved in this case, it is here. What could be more repulsive to our orderly system of laws than to clothe such an official with such power? This would be one giant step in the direction of government of men rather than of laws, and we submit that this Court cannot and must not allow it.

STATUTORY MEANING UNCHANGED BY THE REMOVAL OF REPUGNANT LANGUAGE

Even if we concede, arguendo, that the phrase "shall be conclusively presumed to be the operator of such machine" contravenes the State or Federal Constitutions, the burden of the tax is not shifted. The State agrees, we think, that the striking of the clause which it finds repugnant leaves the rest of the statute intact. *Hull v. Underwood*, 258 Ala. 392, 63 So.2d 683. Thus, the statute, sans that portion, would read:

> "In the event that any unlicensed machine * * * is found in any establishment or place of business, the operator of such establishment or place of business * * * (Allegedly unconstitutional proviso omitted) * * * shall be liable for the license therefor."

We can conceive of no more clear and unambiguous language. The Legislature has simply stated that the operator of the establishments or places of business where the machines are located, a class of persons other than the Appellants, must bear the tax. The same result attains if the word "may" is substituted for "shall", and/or "prima facie" is substituted for "conclusively". The phrase "shall be liable for the license therefor" cannot be ignored. There is no constitutional objection to the Legislature's levying a license on one for the privilege of allowing the operation of a machine in his place of business.

CONCLUSION

In short, Appellants contend the Constitution of the United States is violated by the ruling of the Alabama State Courts in the decree and opinion hereunder considered, in that:

(1) The unconstitutionality of a statute may not be raised by one relying on the validity of the statute.

(2) A statute, providing for a conclusive presumption to arise from the existence of certain facts (such as where the effect of the conclusive presumption is simply to require the operator of a business to pay the license on any unlicensed machine in his place of business), provides a rule of law, as distinguished from a rule of evidence, and is, therefore, not unconstitutional.

(3) The construction of Code of Alabama, Title 51, Section 613, providing that the taxing authority may (or may not) presume an operator of a business in which an unlicensed vending machine is displayed to be the operator of the machine, places an unbridled discretion in a state official to act without a hearing and without rules to guide the exercise of the discretion. The proviso, if so construed, therefore, violates the provisions of the "due process" clauses of the Fifth and Fourteenth Amendments and the "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

(4) The construction of the questioned proviso by the State Courts vests a legislative power (that is, the power to determine which of two people shall be responsible for a license) in an executive official. Section

4 of the United States Constitution provides that the United States shall guarantee to each state a republican form of government, and the division of powers between the executive, legislative, and judicial branches of Alabama's Government as set up by Section 43 of the Constitution of Alabama composes the heart of Alabama's republican form of government which is so guaranteed.

(5) The proviso in said Section 613 being construed to allow a State of Alabama official to decide retrospectively which of two persons should have bought a license for a machine, Section 834 of the same title (providing criminal sanctions for failure to obtain the license in question) is an "ex post facto" law in violation of Section 10 of the United States Constitution in that it provides a criminal penalty for having failed to obtain a license, when there was no clear designation as to who should obtain the license, until after it became delinquent.

(6) The State Courts' changing the plain, unambiguous meaning of the statute (from a statute directing who shall be responsible for a tax to a statute providing that some official shall have a discretion as to who shall pay a tax) was a judicial invasion of the legislative powers designated to the Alabama Legislature in violation of Section 43 of the Alabama Constitution. Federal protection of Section 43 rights is secured by the guarantee of a republican form of government contained in Section 4 of the United States Constitution.

(7) The State Courts, in purging the questioned statute of its supposed repugnance to the Constitution, not only removed the supposedly constitutionally re-

pugnant language but removed additional language and substituted other language while those Courts' authority was limited to the removal of repugnant language.

In seeking a justification for collecting a license tax on vending machines from whoever can be made to pay the same, the Alabama Department of Revenue has become enmeshed in its own snare. While insisting that the operator of the machine is liable for the license, it has sought to pass laws placing a dual or alternate liability therefor on the operator of the place of business wherein the machine is located. Constitutional safeguards prohibit enforcement of a statute which is "neither fish nor fowl". As has been herein demonstrated, the construction of the statute in question by the State Courts is constitutionally unsound and must not stand.

Respectfully submitted,

ROBERT E. VARNER

ROBERT B. STEWART
P. O. Box 429
Montgomery, Alabama
Attorneys for Appellants

I hereby certify that I have served a copy of the foregoing appeal on the Honorable William H. Burton, Assistant Attorney General of the State of Alabama, Counsel of Record for the Appellee in the above-styled cause, by depositing the same in the United States mail-box, with first-class postage prepaid, addressed to said Counsel at his post office address, this the _____ day of _____, 1967.

_____

Of Counsel for Appellants

APPENDIX "A"

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1966-67

JOE D. MORGAN AND JACK THORNTON, ETC.

3 Div. 223

versus

STATE OF ALABAMA

Appeal from Montgomery Circuit Court, In Equity

SIMPSON, JUSTICE.

This is an appeal from a final decree rendered by the Circuit Court of Montgomery County, in Equity, which after careful consideration, this Court adopts as its opinion: The decree sets out the facts and issues involved herein.

"This cause came on to be heard on the 14th day of September, 1965, and was submitted on the pleadings filed by the respective parties, a stipulation made between the parties and introduced in evidence as a joint exhibit, and statements made by counsel, as well as briefs filed by counsel for the benefit of the Court.

"The Court after carefully considering the evidence and also the arguments and the contentions made by counsel as contained in the briefs filed, makes the following findings and conclusions:

"The facts of this case are set out in the stipulation entered into by the parties and which has been introduced in evidence as a joint exhibit, and there appears to be no dispute in the facts.

"This case originated in this Court as four appeals taken on the Equity side under the provisions of Title 51, Section 140, Code of Alabama 1940, Recompiled 1958, from four final assessments made against the appellants by the State Department of Revenue, copies of which have been attached to the stipulation as exhibits thereto, for license taxes under Title 51, Section 513, Code of Alabama 1940, Recompiled 1958, for the appellants allegedly operating in this State a number of penny-in-the-slot gumball vending machines, during the periods of time designated in the assessments, namely, October 1, 1958 — September 30, 1959, October 1, 1959 — September 30, 1960, October 1, 1960 — September 30, 1961, and April 1, 1961 — September 30, 1961. The specific number of vending machines involved during each of the periods is stated in each of the assessments. The assessments in this respect are in the total amounts of $680.19, $656.07, $631.95 and $299.33, respectively, with interest to be added at the rate of six percentum per annum from November 9, 1961, the date that they were made final.

"The appellants during the time involved operated as a partnership known as the M & T Gum Machine Company, and in respect to the vending machines and the gumballs vended thereby entered into a contract with the Ford Gum & Machine Company, Inc., a New York corporation, with offices in Lockport, New York, and certain civic clubs in this State who were designated as 'sponsors' and who for an amount equivalent to

twenty percent of the proceeds from the vending machanes, which they were to donate to some charity, were to procure the consent of business establishments in this State to place the vending machines in their places of business for the purpose of vending the gum through said machines without any charge being made for placing the machines in their establishments. A copy of the contract which was typical of all the transactions involved is attached to the stipulation also as an exhibit thereto.

"The facts of these cases as are otherwise set forth in the stipulation are as follows:

> "'The Ford Company, hereinafter called "Manufacturer", under its contracts sells the machines and the gum vended thereby to the "operator", and the "operator" owns and keeps the machines in operation and in repair. The manufacturer and the operator work in conjunction with civic clubs in each town wherein they operate, such civic clubs being known as the "sponsor". The civic club makes arrangements for the location of the machines and generally sponsors and promotes in its name the program of sales throughout its jurisdictional area. Under its contract with the manufacturer and the operator the sponsor receives twenty (20%) percent of gross receipts from the operator and agrees to pay any tax required to be paid on the machines, and the contract provides that said twenty (20%) percent be used for charitable purposes. The manufacturer sells the machines to the operator and the gum is sold to the operator who pays the manufacturer therefor. The operator services the machines, maintains a supply of gum therein, and removes the pennies therefrom and gives the sponsor twenty

(20%) percent of such proceeds. The sponsor, through the good will of the merchants and businessmen of the community is allowed to place the machines in their place of business free of charge, and the sponsor receives its share of the gross monthly receipts from the operator of the machines as aforesaid. A copy of the contract made between the manufacturer and the operator and sponsors is attached and is incorporated herein and made a part hereof.'

"There was also some evidence introduced under the stipulation to the effect that the Ford Gum Company had commenced operations in Alabama in or before 1949, and that no license tax, prior to the time involved in these cases, was demanded or collected to their knowledge on the operation of the Ford penny vending machines where at least twenty percent of the proceeds from the machines were donated to charity in the State of Alabama. There was also evidence in the stipulation to the effect that when these cases arose that this was the first time that the question of whether or not the operators of penny vending machines who gave at least twenty percent of the proceeds derived from the operation of such machines to charity were exempt from the payment of the vending machine license tax under Section 613, Title 51, Code of Alabama 1940, and as amended was ever called to the attention or presented to the Department.

"It was also stipulated that if the present Chief of the License Tax Division of the State Department of Revenue, and the former Chief of said Division were present in Court, that they would testify that on May, 1957, the Department promulgated the following directive, which was distributed to all members of its field

force as well as to members of the vending machine trade in this State, to wit:

"'May 9, 1957

"'TO ALL FIELD MEN

> "'The definition of the word "operator" as interpreted by our Legal Division includes, but is not necessarily limited to, the person who owns or exercises control of the vending machine and services said machine, whether or not the machine is placed in operation on a commission or rental basis.'

"Included within the scope of the vending machine license tax under Section 613, Code 1940, Recompiled 1958, are the following machines, among others:

> "'For each machine for vending *gum*, soft drinks, ice cream . . .' (Emphasis supplied.)

"Section 613, supra, expressly levies the vending machine license on the following person:

> "'The license herein provided for shall be levied upon *the operator of the machine*, . . .' (Emphasis supplied.)

"The proviso under consideration and which is also found in Section 613, supra, is materially, as follows:

> "'. . . provided, however, that in the event any unlicensed machine . . . is found in any establishment or place of business, the operator of such establishment shall be conclusively presumed to be the operator of such machine . . .'

"The first question to be resolved is whether the proviso under consideration is so clear in its meaning that the presumption provided for therein is a conclusive and irrefutable one that it cannot otherwise be interpreted or construed.

"If it is determined that the presumption is a conclusive one, then the question has been raised as to whether it is valid. In other words, if it is conclusive then can it stand up under the Due Process Clause of the Federal Constitution and comparable provisions of the State Constitution?

"In the opinion of the Court the proviso involved calls for an interpretation and is subject to construction. To conclude without further consideration that the proviso on its face contains an irrefutable presumption that the owner of an establishment where an unlicensed vending machine is found is conclusively presumed to be the operator of the machine would because of the question of due process which would arise cast serious doubts concerning its constitutionality. Moreover, the well established rule is that where such doubt arises, then a statute should be construed in such a way if it is at all possible to do so, to give it validity and to remove any question of its constitutionality. *Henry v. McCromack Bros. Motor Co.*, 232 Ala. 196, 167 So. 256; *Johnson v. State*, 245 Ala. 449, 17 So.2d. 662, among others.

"While the word 'shall', as used in statutes or otherwise, is generally said to be used in the imperative or mandatory sense, there is a very notable exception to this where from the circumstances it is obvious that the legislature intended otherwise and also where the validity of the statute itself is placed in jeopardy. The

exception appears to recognize the fact that the man on the street, aside from the strict rules of grammar, often uses the words 'shall' and 'may' interchangeably and without regard to fineness of meaning. Thus, to carry out the real legislative intent, and as it has been said to prevent injustice being done by making justice the slave of grammar, courts have under similar circumstances as are here involved construed the word 'shall' as permissive and as equivalent to 'may'. See Black's Law Dictionary, Fourth Edition, 'May' and 'Shall' and the numerous authorities cited therein which support the use of said exception where the circumstances permit, and 82 C.J.S., Section 380, pp. 878, 881, and cases cited in the footnotes.

"By applying this rule or exception to the proviso under consideration in Title 51, Section 613, supra, the pertinent part of the proviso can be construed to read, '. . . such establishment (may) be conclusively presumed to be the operator of such machine . . .' This would suggest some leeway on the part of those charged with the enforcement of the license tax laws to ascertain who the actual operator of the machine is for the purpose of assessing the vending machine license tax, and in the case of the owner of the establishment the right under said proviso to have his day in court and to present proof to the contrary where he is not the operator of the machine.

"The question of who is the real operator of a vending machine is a question of fact, and where there is a dispute a question of proof. The presumption contained in this proviso then clearly affects the right of proof and to present evidence to the contrary. Consequently, it is clear that the legislature in this respect

did not intend to make a rule of substantive law for in cases such as the one presented here there is no rational connection in fact or probability in experience by which to conclusively and finally determine that the owner of the establishment is the same person as the operator of the vending machine, just because he has allowed the machine to be put in his place of business. To do so under the circumstances then would appear to be both arbitrary and capricious.

"For the conclusion contained in the proviso to be so construed as a conclusive and irrefutable one than would in the opinion of the Court effectively deprive the operator of the place of business, where the machine is located, of his day in Court and would be in the Court's opinion in conflict with the Due Process Clause of the Federal Constitution and comparable provisions of the State Constitution and cause the proviso to be unconstitutional. *Zeigler v. South & North R. R. Co.*, 58 Ala. 594; *Pike v. Southern Bell Telephone & Telegraph Co.*, 263 Ala. 59, 81 So.2d 254; *Schlesinger v. Wisconsin*, 270 U. S. 230, 46 S.Ct. 260, *Hoper v. Tax Commission of Wisconsin*, et al., 284 U.S. 206, 52 S.Ct. 121, 122; *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 360; and *United States v. Provident Trust Co.*, 291 U.S. 272, 54 S.Ct. 389, 392.

"The appellants have introduced by way of the stipulation some evidence to the effect that although the 'manufacturer', Ford Gum Company, came into Alabama in or about 1949, the State made no attempt to collect the license on its operations or those with whom it dealt in this State in operating penny gumball vending machines, and where twenty percent of the proceeds of such machines were allegedly given to charity, until

these cases arose. In this respect the appellants argue that this established a kind of precedent on the part of the State that such operations were not subject to the vending machine license. There is no evidence, however, that the State ever made any administrative interpretation of Section 613, supra, in this respect or that the State Department of Revenue ever issued any rulings accordingly. It appears that the failure to cite for the license until about the time the final assessments were made was probably caused by the failure of agents of the State to detect such operations until such time. It is also notable that at the time these cases arose there was no exemption contained in Section 613, supra, or in the license tax laws of this State which would expressly exempt from the license tax laws of this State the operation of such penny gumball vending machines, where twenty percent of the proceeds of such machines were allegedly given to charity. However, after these cases arose and in 1961, and by Act No. 38, Special Session of the Legislature 1961, effective October 1, 1961 (Acts 1961, Vol. II, pages 1890, 1893), the legislature did amend Section 613, supra, to expressly provide for such an exemption effective as of October 1, 1961. In the opinion of the Court the evidence as so presented by the appellants did not establish a precedent or any administrative ruling or interpretation on the part of the State whereby said gumball vending machines would be exempt from the license during the time involved in these cases. *Griffin, et al., v. Edwards, Commissioner of Revenue,* 260 Ala. 12, 68 So.2d 705, 708, 709.

"The foregoing being considered, the Court makes the following conclusions of law:

"1. The appellants as owners of the vending machines involved and the gumballs vended thereby, kept the machines supplied with gumballs and otherwise serviced the machines and controlled their operation, as well as having taken the pennies therefrom as the owners thereof, were the operators of the machines as the term 'operator' is used in Title 51, Section 613, Code 1940, Recompiled 1958, and as such were liable for the license levied thereby for the operation of each of the vending machines included in the final assessments.

"2. The legislature in enacting the proviso in Section 613 which is under consideration in this case, and in providing that the 'establishment shall be conclusively presumed to be the operator of the machine', where an unlicensed vending machine is found in the establishment, appears under the circumstances to have clearly used the word 'shall' as being merely permissive and as the equivalent of 'may', and thus intended the conclusion to be a rebuttable one, where there was evidence to the contrary.

"3. To construe the word 'shall' as used in said proviso in the sense of being imperative or mandatory, and the presumption to be a conclusive and irrefutable one would cause the proviso to be unconstitutional, as being in conflict with the Due Process Clause of the Federal Constitution and comparable provisions of the State Constitution.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that judgment be and is entered in this cause in favor of the appellee and against the appellants and the sureties on their supersedeas bond, and the four final assessments of license

tax which are the subject of the appeals in this cause and which were all made on November 9, 1961, and in the amounts of $680.19, $656.07, $631.95 and $299.33 respectively, are hereby in all respects affirmed, and the relief prayed for by the appellants denied. Interest is to be added to the total amounts of said assessments at the rate of six percentum per annum from November 9, 1961, to date. And IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the costs be and same are taxed against the appellants, and for the amount of the judgment and the cost execution may issue against the appellants and the sureties on their supersedeas bond on file in this Court."

AFFIRMED.

Livingston, C.J. Merrill and Harwood, J.J., concur.

I, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 26th day of January 1967.

RICHARD W. NEAL
Deputy Clerk, Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

THURSDAY, FEBRUARY 16, 1967

HE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: ALL THE JUSTICES

3rd Div. 223

JOE D. MORGAN AND JACK THORNTON, ETC.

versus

STATE OF ALABAMA

MONTGOMERY CIRCUIT COURT, IN EQUITY

IT IS ORDERED that the application for rehearing iled on February 10, 1967, in the above styled cause, e and the same is hereby overruled.

I, Richard W. Neal, Deputy Clerk of the Supreme ourt of Alabama, do hereby certify that the foregoing s a full, true and correct copy of the instrument(s) erewith set out as same appears of record in said Court.

Witness my hand this 3 day of April 1967.

RICHARD W. NEAL
Deputy Clerk, Supreme Court of Alabama

APPENDIX B

de of Alabama, Title 51

"§613. Vending machines. — For each machine for
nding gum, candy, soft drinks, ice cream, coffee, pop-
rn, food of any kind, drink of any kind, pencils, hand-
rchiefs, combs, drinking cups, cigarettes or other to-
cco products, or other articles or merchandise, and
each machine for use in testing strength or grip,
ining shoes, making or developing photographs, re-
rding the voice or other sound, and each coin-operated
dio, and each coin-operated machine by which a person
weighed, and each coin-operated machine for use in
tertainment or skill, and each coin-operated machine
which music is played, and each location, establish-
nt, or place of business receiving much [music] trans-
tted by wire or cable from any central point or studio
ether such point or studio is situated within or with-
t such location, establishment, or place of business:
.00 for each machine that may be operated by pennies;
.00 for each machine that may be operated by nickels
coins of a larger denomination; and a separate li-
nse shall be issued for each such machine that may
operated by pennies, nickels, or coins of a larger de-
mination, which license shall be prominently displayed
or immediately near to such machine; except that
tels, motels, tourist camps, or other places of business
ving less than five (5) coin-operated radios, $8.00;
d for each such radio in excess of four (4) $2.00 each;
.00 for each location, establishment, or place of busi-
ss receiving transmitted music by wire or cable, ex-
ot that such locations, establishments, or place of busi-
ss having less than five (5) transmitters or speakers
.00 and for each such transmitter or speaker in excess

our (4) $2.00 each; provided that one license may sued to include all coin-operated radios and/or trans- ers or speakers located within such hotel, motel, st camp, location, establishment, or other place of ness, which license shall be prominently displayed. licenses herein provided for shall be levied upon the tor of the machine, the coin-operated radio, or the al point or studio from which point or studio the is transmitted; provided, however, that in the any unlicensed machine, coin-operated radio, trans- r or speaker is found in any establishment or place siness, the operator of such establishment or place usiness shall be conclusively presumed to be the tor of such machine, coin-operated radio, transmit- r speaker and shall be liable for the license there- Provided that nothing in this section shall apply to ines installed by any person, firm or corporation, o coin-operated gas meters, nor to coin-operated ones, nor to machine vending postage stamps in lace of business vending necessary articles on a rofit basis for emergency use only by the employees ch person, firm or corporation. Provided that no e shall be required under this section where a ege or dealer's license is required by this chapter e sale of such articles and such privilege license have been obtained by the person, firm or corpora- perating the place of business where such machine ated, or the owner of such vending machine shall secured such privilege license as required herein. led, further, that no license for vending machines, g merchandise in industrial plants or on private ty for use of employees, or machines on which s are weighed, shall be required, if in lieu there- person, firm or corporation engaged in the busi-

ness of operating such machine shall have applied for and obtained an occupational license and shall have paid therefor, as follows: In counties of sixty thousand inhabitants or less — thirty dollars. In counties of sixty thousand and one and not exceeding one hundred and twenty-five thousand inhabitants — sixty dollars. In counties of one hundred and twenty-five thousand and one inhabitants and over — eighty dollars. Any person operating or permitting the operation of a vending machine dispensing packages or in quantities less than a package of cigarettes, or any article on which there is an excise tax the payment of which is evidenced by stamps, without first having paid the tax thereon by affixing the required stamps to the original package as required under section 718, of this title shall be guilty of a misdemeanor and punished as provided in such section for failure to pay said tax. Each vending machine vending tobacco products of any kind whatsoever shall have securely affixed thereto in full view the name and address of the legal owner of said machine. The privilege license required by law or the vending machine license issued to cover vending machines shall be securely affixed in full view to each such vending machine before said machine is placed in operation or use. Provided that when tobacco products of any kind whatsoever are found in such vending machines to be improperly stamped or unstamped, in violation of section 718 of this title, such vending machine and contents shall be confiscated by any duly authorized agent of the department of revenue as provided in section 718 of this title, for the confiscation of improperly stamped or unstamped tobacco products. Each vending machine vending tobacco products of any kind whatsoever shall have a transparent front window, or windows, through which

the Alabama revenue stamps required by section 718 of this title may be seen without the necessity of opening or unlocking the vending machine. Provided further that for the purpose of any excise or consumption taxes the payment of which is not evidenced by stamps, levied on any of the articles dispensed through such machines, the person in whose place of business each machine is located shall be considered the consumer of such article and shall be liable for such taxes measured by the regular retail price thereof. Provided further that no license shall be required under this section for home type merchandise vending machines placed in private homes for home use only and not for public use; provided further that nothing herein contained shall be construed as legalizing or licensing any machine or devise which is now illegal or which may hereafter be declared illegal; provided further that all the licenses levied by this section shall bear the business address of the owner or operator thereof; it being the legislative intent that only one state and one county license shall be required for the operation of a vending machine under this section within this state for any one license year. Provided further the license shall be purchased in the county in which the machine is located or in operation on October 1st or at the time license is purchased for the licensing year.